

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6777 of 1997

with

CRIMINAL MISC.APPLICATION No 6778 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

RATHOD AMARSINHJI HIMATSINHJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 6777 of 1997
MR AM PAREKH for Petitioners
MR UMESH TRIVEDI ADDL PUBLIC PROSECUTOR for Respondent No. 1
MR SG UPPAL for Respondent No. 2
 2. Criminal Misc.ApplicationNo 6778 of 1997
MR AM PAREKH for Petitioners
MR UMESH TRIVEDI ADDL PUBLIC PROSECUTOR for Respondent No. 1
NOTICE SERVED for Respondent No. 2
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ORAL JUDGEMENT

#. The petitioners herein challenge the order passed by the Judicial Magistrate First Class, on 8-10-97 below Exh.28 in Criminal Case No : 196 & 197 of 1996 pending before him directing to issue process against the present petitioners for the offence under Section 408 read with Section 107 and 108 of Indian Penal Code while exercising powers under Section 319 of Criminal Procedure Code. The original complaint was lodged against one Vinodchandra Natwarlal Muththa. The learned Magistrate after initially recording evidence on the complainant side, framed charge against the accused. Thereafter, on application from the complainant side, notice was issued to the present applicants who gave appropriate reply and after hearing the parties, the learned Magistrate passed the impugned order which is the subject matter of challenge in this application.

#. Mr.Parekh, learned advocate appearing for the applicants has submitted that the learned Magistrate erred in issuing process not considering that there is no allegation against any of the applicants in the complaint nor is there any evidence against any of them for the charges they are sought to be summoned before the Court for. He further submitted that the applicants are not servants under Section 408, therefore, the same would not be attracted, and hence, the Magistrate has erred in passing the order for issuance of summon under Section 408 read with Section 114. He also submitted that if Section 408 is not applicable, Section 406 would be applicable for which maximum punishment of 3 years is prescribed. The incident is dated 30-6-1986 for which, a complaint was lodged on 20th October, 1994 and the application for joining the present applicants as accused was tendered on 6-12-1996. If the provisions of Section 408 are taken into consideration, the complaint as well as this application would be beyond limitation. Mr.Parekh, has also placed reliance on certain decision of the Apex Court and has urged that the order may be quashed and set aside.

#. Mr. Umesh Trivedi, learned APP appearing for the State - respondent No.1 has opposed this application on the ground that the allegation is under Section 408 read with Section 114 and therefore, there is no question of limitation. He further submits that the decision relied upon by Mr.Parekh would not be applicable to the present case and therefore, the application may be dismissed.

#. Mr. S.G. Uppal who has filed his appearance for respondent No.2 is not present when the matter is called out.

#. Having considered and taken into account the rival contentions of both the parties and in light of the facts particularly the copies of the evidence produced on record by Mr.Parekh, it is amply clear that none of witnesses, including two witnesses viz. one Harshadbhai Chandulal Patel and Nagajibhai Ganeshbhai Patel, indicate involvement of petitioner in the offence. The Magistrate was therefore factually in error in issuing process against the present applicants as there is no material to record satisfaction about the involvement of these persons in the commission of the alleged offence.

##. In the result, the application must succeed. The impugned order passed by the learned Judicial Magistrate First Class, Khedbrahma on 8-10-1997 below Exh.28 in Criminal Case No : 196 & 197 1996 is hereby quashed and set aside. Rule is made absolute accordingly. The petition stands disposed of accordingly.

Date : 17-6-1999 [A.L.Dave,J.]

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